Supreme Court, U.S.
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NO. 88-1887

in the
Supreme Court
of the
United States

OCTOBER TERM, 1988

WILLIAM N. HUTCHINSON, JR., Esq.,
Petitioner,

vs.

McDONALD'S CORPORATION,
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF McDONALD'S CORPORATION IN OPPOSITION

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QUESTION PRESENTED

WHETHER A UNITED STATES DISTRICT COURT CORRECTLY IMPOSED SANCTIONS FOR ATTORNEY MISCONDUCT

PARTIES TO PROCEEDING BELOW

This action began as a complaint filed by plaintiff, ROBERT BAKER, against defendants, McDONALD'S CORPORATION, ROBERT WISEMULLER, JEAN ACIERNO and FRED COLLINS. Petitioner, WILLIAM N. HUTCHINSON, JR., Esq. was the attorney for plaintiff, ROBERT J. BAKER.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

FEDERAL RULES OF CIVIL PROCEDURE 2

RULE 11 (Prior to amendment) 2

RULE 11 (As amended) 3

STATEMENT OF THE CASE 4

REASONS FOR DENYING CERTIORARI 7

PETITIONER'S ARGUMENT IS UNTIMELY AND NOT PROPERLY BEFORE THIS COURT

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN IMPOSING SANCTIONS ON PETITIONER.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH TWO OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

CONCLUSION 22

TABLE OF AUTHORITIES

CASES: **PAGE NUMBER**

Air France v. Saks, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) 9,10

Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) 10,11,12,13

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, (5th Cir. 1984) 8

Eastway Construction Corporation v. City of New York, 762 F.2d 243 (2nd Cir. 1985), *cert. denied*, __ U.S. __, 108 S.Ct. 269 (1987) 11

Elster v. Alexander, 122 F.R.D. 593 (N.D. Ga. 1988) 17,20

Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983) 13

Hall v. Coal, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973) 11

Hashemi v. Campaigner Publications, Inc., 784 F.2d 1581 (11th Cir. 1986) 18,19,20

Holley v. Seminole County School District, 763 F.2d 399, 401 (11th Cir. 1985) 8

Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984) 9,10

CASES CONT. PAGE NUMBER

Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719, 83 L.Ed. 1037 (1941) 7,9,18

Incomco v. Southern Bell Telephone and Telegraph Co., 558 F.2d 751 (5th Cir. 1977) 13,16

Itel Securities Litigation, 596 F.Supp. 226 (N.D. Cal. 1984), *aff'd*, 791 F.2d 672 (9th Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 880 (1987) 11

Jamestown Farmers Elevator, Inc. v. General Mills, 552 F.2d 1285, (8th Cir. 1977) 9

Joseph v. New Orleans Pension and Retirement Plan, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied*, __ U.S. __, 106 S.Ct. 526 (1985) 8

Kendrick v. Zanides, 609 F.Supp. 1162 (D.C. Cal. 1985) 12

Kinee v. Abraham Lincoln Federal Savings and Loan Association, 365 F.Supp. 975 (E.D. Penn. 1973) 14,16

Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) 8

Nemoroff v. Ableson, 620 F.2d 339 (2nd Cir. 1980) 12

Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 1373 (1987) 18,20,21

CASES CONT. **PAGE NUMBER**

Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451 (7th Cir. 1987) 17,18,19,20,21

Rhinehart v. Stauffer, 638 F.2d 1169 (9th Cir. 1979) 13,16

Roadway Express Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) 10,11

Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) 17

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed. 2d 826 (1976) 8,9

Sugar Industry Anti-Trust Litigation. Stodder & Co., Inc. v. Amstar Corp., 579 F.2d 13 (3rd Cir. 1978) 9

Tadeschi v. Smith, Barney, Harris, Upham and Co., Inc., 579 F.Supp. 657 (S.D. Dist. N.Y. 1984). *aff'd*, 757 F.2d 465 (2nd Cir. 1985), *cert. denied*, __ U.S. __, 106 S.Ct. 147 (1985) 16

Terry Properties, Inc. v. Standard Oil Co., 799 F.2d 1523 (11th Cir. 1986) 16

United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983) 11

United States v. Sutherland, 428 F.2d 1152, (5th Cir. 1970) 8

CASES CONT. PAGE NUMBER

Wells v. Rushing, 760 F.2d 660 (5th Cir. 1985) 8

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1927 11,12,17,18

42 U.S.C. § 1981 4,15

42 U.S.C. § 1983 4,15,16

42 U.S.C. § 1985(3) 4,15,16

42 U.S.C. § 2000(e) 4,15

47 U.S.C. §§ 206–207 13

FEDERAL RULES OF CIVIL PROCEDURE:

Federal Rule of Civil Procedure 11 (Prior to Amendment) ...2,3,10,12,13,14,15,16,18,21

Federal Rule of Civil Procedure 11 (As Amended) 3,4,5,6,10,12,16,17,18,19,20,21

CONSTITUTIONAL PROVISIONS:

Thirteenth Amendment 4,6

Fourteenth Amendment 4

NO. 88-1887

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OCTOBER TERM, 1988

WILLIAM N. HUTCHINSON, JR., Esq.,
Petitioner,

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McDONALD'S CORPORATION,
Respondent.

OPINION BELOW

The Order Granting Motion for Sanctions in Part by the United States District Court for the Southern District of Florida, Paine, J., is reported at 686 F.Supp. 1485 (S.D. Fla. 1987) (Petitioner's Appendix 2). A related Order Granting Motion for Summary Judgment, Findings of Fact and Conclusions of Law is reported at 686 F.Supp. 1474 (S.D. Fla. 1987) (Petitioner's Appendix 1). The opinion of the Court of Appeals for the Eleventh Circuit was not published (Petitioner's Appendix 3). The Order of the Eleventh Circuit Court of Appeals on Petitioner's Petition for Rehearing *En Banc* was not published (Petitioner's Appendix 4). All of the opinions reprinted in Petitioner's Appendix shall hereinafter be referred to as "Pet. App. __."

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on December 21, 1988. A Petition for Rehearing was filed January 19, 1989. The Petition was denied February 21, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Prior to the 1983 amendment, Rule 11 provided:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation

of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

As amended, effective August 1, 1983, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this

rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses, incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

On April 25, 1983, Petitioner William N. Hutchinson (hereinafter "Petitioner") filed a Complaint in the United States District Court for the Southern District of Florida (hereinafter "District Court") on behalf of his client, Robert J. Baker (hereinafter "client"). Petitioner alleged numerous causes of action based on his client's termination of employment by Respondent McDonald's Corporation (hereinafter "Respondent"). The causes of action included racial discrimination in violation of 42 U.S.C.§§ 1981, 1983, 1985 and 2000e, as well as the Thirteenth and Fourteenth Amendments of the United States Constitution and additional actions for defamation and slander under Florida law (Pet. App. 1).

On December 4, 1987, the District Court found no merit to any of Petitioner's allegations and granted Respondent's Motion for Summary Judgment, reported at 686 F.Supp. 1474 (S.D. Fla. 1987) (Pet. App. 1). In a separate Order issued concurrently and reported at 686 F.Supp. 1485 (S.D. Fla. 1987), the District Court imposed sanctions in part against Petitioner pursuant to Federal Rules of Civil Procedure 11 (hereinafter "Rule 11") (Pet. App. 2). In its Order granting Motion for Summary Judgment, the District Court directed Petitioner's client, Plaintiff in the action below, to pay one-seventh (1/7) of Respondent's reasonable

attorney's fees plus costs (Pet. App. 1–21). In its Order granting Motion for Sanctions in Part, the District Court directed Petitioner to pay five–sevenths (5/7) of Respondent's reasonable attorney's fees (Pet. App. 2–5). The District Court directed Respondent to submit a bill of costs and application for attorney's fees to the Court within 15 days (Pet. App. 1–21, 2–5). Pursuant to the District Court's Orders, Respondent timely filed a Bill of Costs and Application for Attorney's Fees. While the District Court granted them the opportunity to file objections to Respondent's proposed bill of costs and fees within 10 days, Petitioner and his client chose not to file any objections.

On January 4, 1988, Petitioner filed with the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") a Notice of Appeal from the Orders granting Summary Judgment and Imposing Sanctions in Part. Petitioner's brief to the Eleventh Circuit never raised an issue that Rule 11 was incorrectly applied.

During the pendency of the Eleventh Circuit appeal Respondent moved the District Court to enter judgment against Petitioner and his client in the amount of the requested attorney's fees and costs on January 20, 1988. On August 23, 1988, the District Court granted Respondent's Motion and ordered Petitioner's client to pay Respondent the sum of $7,042.07 in attorney's fees, plus costs in the amount of $3,827.66. The District Court further directed that Petitioner pay Respondent $35,210.35 in attorney's fees. Petitioner and his client did not appeal the August 23, 1988 Order and Judgment of the District Court.

On December 21, 1988, the Eleventh Circuit issued a final judgment affirming the District Court's December 4, 1987 Orders granting Respondent's Motions for Summary Judgment and Imposing Sanctions in Part (Pet. App. 3). Subsequently, on January 9, 1989,

Petitioner filed a Motion for Rehearing *En Banc* claiming for the first time that the District Court incorrectly applied Rule 11. The Eleventh Circuit subsequently upheld its earlier affirmance of the District Court's Orders and denied Petitioner's Motion for Rehearing *En Banc* on February 21, 1989 (Pet. App. 4). The Eleventh Circuit modified ***sua sponte*** its earlier opinion regarding a party's inability to file an action directly under the Thirteenth Amendment. The court stated that a party could file an action directly under the Thirteenth Amendment, but further stated no factual basis for such action was present in the case at bar (Pet. App. 4–2).

Implicit in the Orders of both the District Court and the Eleventh Circuit is the recognition that Petitioner filed and prosecuted the instant action for over five (5) years knowing that it was entirely without merit and unsupported in fact or law. The actions of the lower courts were correct and fully supported by well–established precedent. Accordingly, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

PETITIONER'S ARGUMENT IS UNTIMELY AND NOT PROPERLY BEFORE THIS COURT.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN IMPOSING SANCTIONS ON PETITIONER.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH TWO OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

Petitioner's Argument is Untimely and Not Properly Before this Court.

An Appellate Court will refrain from ruling on issues not previously decided by the trial court. Similarly, an ***en banc*** court will not address arguments not passed on by the trial court or the appeals court. Moreover, issues raised for the first time during a motion for rehearing have been adjudged untimely and precluded consideration by this Court in a Petition for Writ of Certiorari.

The general rule that a Federal Appellate Court will not consider an issue not passed upon by the trial court was delineated in ***Hormel v. Helvering,*** 312 U.S. 552, 61 S.Ct. 719, 83 L.Ed. 1037 (1941). In ***Hormel*** the Court stated that this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." 312 U.S. at 556, 61 S.Ct. at 723. This Court further stated that the only

circumstances in which a Federal Appellate Court is justified in resolving an issue not passed on below was where "injustice might otherwise result." 312 U.S. at 557, 61 S.Ct. at 721. This Court reiterated the general rule in *Singleton v. Wulff*, 428 U.S. 106, 120–21, 96 S.Ct. 2868, 2877, 49 L.Ed. 2d 826 (1976). The Federal Courts of Appeal have followed this rule and found that issues raised for the first time in a Motion for Rehearing were untimely and not properly before the court for consideration. *Wells v. Rushing*, 760, F.2d 660 (5th Cir. 1985).

In *Wells*, the Fifth Circuit was presented with a Petition for Rehearing raising an issue not presented to the trial court or argued in the original appeal. Citing *Singleton*, the court held that, "[H]aving raised the issue neither below nor before us, Wells' complaint on Petition for Rehearing comes too late." *Id.* at 661. *See also, Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984); *Joseph v. New Orleans Pension and Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 526 (1985); *United States v. Sutherland*, 428 F.2d 1152, (5th Cir. 1970) ("Having tried and appealed its case on one theory, an unsuccessful party may not then use a Petition for Rehearing as a device to test a new theory." *Id.* at 1158.)

Similarly, in *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985), the Eleventh Circuit found that an appellant's attempt to raise an issue not previously addressed to the trial court or in the original appeal would not be ruled upon by an *en banc* court. The court stated, "it is especially inefficient for the *en banc* court to rule on matters not ruled upon by the district court or a panel of the court, and an *en banc* court should not rule on issues which do not clearly merit consideration under Fed.R.App. P. 35." *Id.* at 1155. *See also, Holley v. Seminole County School District*, 763 F.2d 399, 401 (11th Cir. 1985). Likewise, the Eighth Circuit and Third Circuit Courts of Appeals have refused to address

issues in a Motion for Rehearing not raised either at the trial court level or in the original appeal. *Jamestown Farmers Elevator, Inc. v. General Mills,* 552 F.2d 1285, 1296 (8th Cir. 1977); *In Re Sugar Industry Anti-Trust Litigation. Stodder & Co., Inc. v. Amstar Corp.* 579 F.2d 13, 20 (3rd Cir. 1978).

In the case at bar, Petitioner appealed the District Court's Order Imposing Sanctions but never argued that the District Court incorrectly applied Rule 11. Although more than one year elapsed between the District Court's imposition of sanctions and the Eleventh Circuit's affirmance, Petitioner challenged the District Court's application for the first time in its Motion for Rehearing *En Banc.* Petitioner's attempt to raise this issue in the Motion for Rehearing *En Banc* was untimely and not properly before the court. Accordingly, the Eleventh Circuit's failure to address the issue in the Motion for Rehearing *En Banc* is consistent with this Court's holdings in *Hormel* and *Singleton.*

This Court should also deny Petitioner's Petition for Writ of Certiorari for failure to timely raise the issue. This Court has previously refused to address arguments raised for the first time in Motions for Rehearing in the Court of Appeals in *Air France v. Saks,* 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) and *Hoover v. Ronwin,* 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). In *Air France* this Court expressly followed its doctrine first announced in Note 25 of *Hoover* that arguments raised for the first time in a Motion for Rehearing in the Court of Appeals are precluded from consideration by this Court. *Air France,* 470 U.S. at 409, 105 S.Ct. 1346–47; *Hoover,* 466 U.S. at 575 n.25, 104 S.Ct. 1998, n.25. In examining a Petitioner's argument raised for the first time during a Motion for Rehearing in the Court of Appeals, this Court observed, "[Petitioner's] failure to raise

this issue in a timely manner precludes our consideration." *Hoover,* 466 U.S. at 576 n.25, 104 S.Ct. at 1998 n.25.

As in *Air France,* Petitioner in the case at bar also failed to raise the alleged incorrect application of Rule 11 by the District Court until filing his Motion for Rehearing *En Banc* in the Court of Appeals. Accordingly, Petitioner should be precluded from raising this issue in the Petition for Writ of Certiorari because of his failure to raise the issue in a timely manner. Following the precedent established in *Hoover* and *Air France,* the Court should deny the Petition for Writ of Certiorari because of Petitioner's failure to raise his argument in a timely manner.

Petitioner's Argument is Irrelevant Since Petitioner's Actions Were Sanctionable Under The Court's Inherent Authority to Sanction, As Well As Statutory Provisions Including The Pre-Amended Version of Federal Rule of Civil Procedure 11.

Federal courts have the inherent authority to impose attorney's fees on any party. In *Roadway Express Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), this Court recognized the inherent authority of federal courts, aside from any statutory provision, to assess attorney's fees. Relying on the decision in *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court held that costs may be awarded to a prevailing party when the unsuccessful litigant has been found to have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 421 U.S. at 258-259, 95 S.Ct. at 1622. This bad faith standard was an exception to the American Rule on attorney's fees whereby a litigant normally does recover counsel fees. This Court reasoned that courts possess the inherent power to award attorney's fees as a means for protecting the integrity of the judicial

process and that this inherent authority extends to a request for attorney's fees, costs and sanctions. The right to recover fees was not limited to actions filed in bad faith, but was also available where bad faith was found in the subsequent conduct of the litigation. *citing, Hall v. Coal,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

Similarly, in *Eastway Construction Corporation v. City of New York,* 762 F.2d 243 (2nd Cir. 1985), *cert. denied,* __ U.S. ___, 108 S.Ct. 269 (1987), the Second Circuit recognized that apart from any statutory provisions regarding attorney's fees and costs, a federal court may award attorney's fees pursuant to its inherent authority. The court relied on *Alyeska Pipeline* and its progeny in assessing costs and attorney's fees to the prevailing party where the unsuccessful litigant was found to have acted in bad faith, vexatiously, wantonly or for oppressive reasons. Likewise, in *In Re Itel Securities Litigation,* 596 F.Supp. 226 (N.D. Cal. 1984), *aff'd,* 791 F.2d 672 (9th Cir. 1986), *cert. denied,* __ U.S. ___, 107 S.Ct. 880 (1987), the district court recognized its inherent authority to assess attorney's fees against counsel pursuant to *Roadway Express* and *Alyeska Pipeline.* The court also noted that it had the statutory authority to grant attorney's fees under 28 U.S.C. § 1927 and was empowered to grant sanctions under Rule 11. *See also, United States v. Blodgett,* 709 F.2d 608 (9th Cir. 1983).

Another basis for upholding the District Court's award of attorney's fees in this case is 28 U.S.C. §1927. This section states:

> Any attorney . . . in any Court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs,

> expenses and attorney's fees reasonably incurred because of such conduct.

In *Kendrick v. Zanides,* 609 F.Supp. 1162 (D.C. Cal. 1985), the district court noted that it had discretion apart from Rule 11 to grant attorney's fees. It recognized the inherent authority to award fees pursuant to *Alyeska* and Section 1927. With respect to Section 1927, the court found that the plaintiff multiplied the proceedings unreasonably and vexatiously, entitling defendant to recover costs, expenses and fees.

In its opinion, the District Court in the case at bar discussed at great length Petitioner's continued pursuit of baseless claims when the true facts were known at the inception of the suit and were made known to Petitioner during discovery proceedings (Pet. App. 2). The District Court recognized Petitioner's bad faith pursuit of baseless claims and justifiably imposed sanctions. Accordingly, the District Court's award of attorney's fees was justified on several grounds besides Rule 11. Attorney's fees were warranted in this case based on Section 1927 and the District Court's inherent authority to impose sanctions. Respondent asserts that since the decision can be upheld on any of these grounds the Petition for Writ of Certiorari should be denied.

The imposition of sanctions under Rule 11 does not result in injustice since Petitioner's pursuit of baseless claims is also sanctionable under the pre-amended Rule 11 standard. Under the former rule, the signature of an attorney constituted a certificate by him that he had read the pleading and that to the best of his knowledge, information and belief, there was good ground to support it. This standard under the former rule was one of bad faith. *Nemoroff v. Ableson,* 620 F.2d 339 (2nd Cir. 1980); *see also, Gordon v. Heimann,* 715 F.2d 531 (11th Cir. 1983) (Eleventh Circuit upheld sanctions

for bad faith under pre-amended Rule 11 and the court's inherent authority enunciated in *Alyeska).*

Courts have approved the imposition of sanctions against a party prior to the amendment of Rule 11. For example, in *Incomco v. Southern Bell Telephone and Telegraph Co.,* 558 F.2d 751 (5th Cir. 1977), a New York partnership filed suit against Southern Bell alleging that the company had wrongfully terminated or interrupted service to the partnership's Miami office. The sole basis to establish federal jurisdiction was 47 U.S.C. §§ 206-207, Chapter 5 of the Federal Communications Act. Pursuant to pre-amended Rule 11, the district court struck the plaintiff's claims under Sections 206-207, holding these claims were without substance as a matter of law. On appeal, the Fifth Circuit observed that based on pre-amended Rule 11, where there was not good ground to support a pleading, the court could strike the pleading as sham and false. The district court further held that there were absolutely no grounds that could support the action under Sections 206-207 as a violation of Chapter 5 of the Communications Act, since the matters at issue were governed by Florida tariffs and were not subject to regulation under the Federal Communications Act. Furthermore, the court noted that there were no facts asserted which could support any violation of the Communications Act. Accordingly, the court affirmed the district court's decision to strike the Sections 206-207 claim.

Similarly, the Ninth Circuit in *Rhinehart v. Stauffer,* 638 F.2d 1169 (9th Cir. 1979), upheld a lower court's dismissal of the complaint under pre-amended Rule 11 for failure of the attorney to investigate and ascertain the merits of his client's claim. In *Rhinehart,* the plaintiff's attorney filed a civil action against the defendant for $1,000,000 in damages for defamation of the plaintiff without ascertaining from plaintiff the factual basis for plaintiff's claim. The district

court found no merit in plaintiff's claims and dismissed the suit pursuant to pre-amended Rule 11. The Ninth Circuit upheld the dismissal and chastised plaintiff's attorney stating, "[B]efore filing a civil action, the attorney has a duty to make an investigation to ascertain that it has at least some merit," *Id.* at 1171.

Likewise, a district court imposed pre-amended Rule 11 sanctions under the bad faith standard because of plaintiff's attorney's failure to properly investigate plaintiff's claim before filing an action in ***Kinee v. Abraham Lincoln Federal Savings and Loan Association,*** 365 F.Supp. 975 (E.D. Penn. 1973). In ***Kinee,*** plaintiffs had obtained mortgages from numerous separate lending institutions and subsequently brought suit alleging anti-trust violations. Plaintiffs sued on their behalf and on behalf of all those similarly situated against 177 different lending institutions. The court held that the method by which plaintiffs' attorneys chose to discover the alleged offending lending institutions was improper and censurable. The court noted that plaintiffs and their attorneys put a large number of parties to the inconvenience, expense and possible anxiety of being sued rather than conduct an appropriate investigation to identify the proper defendants. The court further observed that when the plaintiffs filed their pleadings they did not have a reasonable basis to believe that the allegations were true as to each defendant, but merely that there was, within the aggregate mass of defendants sued, a significant number who would be proper parties.

Utilizing the rationale of the *Incomco, Rhinehart* and *Kinee* courts, it is apparent that sanctions under pre-amended Rule 11 were appropriate in the case at bar. As a part of his Complaint, Petitioner asserted causes of action predicated on violations of the Thirteenth and Fourteenth Amendments to the Constitution and violations of 42 U.S.C. Sections

1983 and 1985, 1981 and 2000(e), as well as a common law claim for slander and/or defamation. The District Court granted Rule 11 sanctions on the causes of action predicated under the Thirteenth and Fourteenth Amendments to the Constitution and 42 U.S.C. Sections 1983, 1985 as well as the common law slander and defamation claims (Pet. App. 2). The decisions of the District Court and the Eleventh Circuit were appropriate under the pre-amended Rule 11 standards and did not result in any injustice. Referring to the deposition of Petitioner's client's wife wherein Respondent repeatedly urged Petitioner to withdraw his clearly baseless claims because they were without factual and legal support, the District Court observed:

> ". . . [I]f it wasn't apparent to Mr. Hutchinson [Petitioner] at the inception of this suit that a claim based on the Fourteenth Amendment and/or Section 1983 was not legally cognizable under the facts of this case, it certainly should have been at the time Ms. Baker's deposition was taken. We note further that, not only did Mr. Hutchinson fail to file a response to the motion for summary judgment, he also failed to respond to the defendant's first motion for sanctions. Moreover, although he did file a response to the defendant's supplemental request for sanctions, that response did not address the issues raised by the defendant (and was legally incorrect to boot). . . .
>
> It was Mr. Hutchinson who signed the pleadings, and who should have known that the facts of this case, not to mention the law, did not support certain of the claims asserted."

(Pet. App. 2-4, 5).

Each of Petitioner's claims was brought in bad faith and each claim was and is baseless and was asserted wantonly for purposes of harassment, delay or other improper purposes. *See, Tadeschi v. Smith, Barney, Harris, Upham and Co., Inc.*, 579 F.Supp. 657 (S.D. Dist. N.Y. 1984). *aff'd*, 757 F.2d 465 (2nd Cir. 1985), *cert. denied*, __, U.S. __, 106 S.Ct. 147 (1985). As in *Incomco*, Petitioner's claim based on 42 U.S.C. § 1985(3) was not warranted by existing law to the extent that it was predicated on an alleged conspiracy to violate Title VII which never existed. Accordingly, pre-amended Rule 11 sanctions are appropriate on this claim in accordance with the *Rhinehart* and *Kinee* holdings since a cursory inquiry into the facts would have precluded the assertion of this claim. Furthermore, Petitioner's claims based on the Fourteenth Amendment and 42 U.S.C. § 1983 were improper and brought in bad faith. Such claims require state action, *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1533-34 (11th Cir. 1986), and it is readily evident from the pleadings that no state actor was ever involved in this case. Accordingly, pre-amended Rule 11 sanctions on this claim were justifiable in accordance with *Incomco*. Finally, Appellant's claims for slander and defamation were without factual basis at the time the complaint was filed and throughout the pendency of this action. Since publication was an essential element of the claim, and the District Court found a complete lack of proof of publication, this type of bad faith conduct warrants sanctions. Therefore, sanctions are authorized for the reasons enunciated in *Rhinehart* and *Kinee*.

Petitioner's argument that sanctions could not be imposed under the amended version of Rule 11 does not withstand careful scrutiny since Petitioner had a continuing duty to ensure that all subsequent filings reflected all of the facts known at the time of the filing. Thus, Petitioner could be sanctioned under

amended Rule 11 after its effective date since he continued to file documents with the court without amending the baseless claims made known to Petitioner early in the case. Courts impose a continuing obligation on parties to ensure that all claims advanced in a lawsuit have arguable merit and are not brought frivolously. As the Fifth Circuit opined in *Robinson v. National Cash Register Co.,* 808 F.2d 1119 (5th Cir. 1987), "[A]ttorneys must realize that the inquiry required by [R]ule 11 is not a one time only obligation, ***counsel have a continuing obligation to review and reevaluate their position as the case develops."*** *Id.* at 1127 (emphasis supplied). *See also Pantry Queen Foods v. Lifschultz Fast Freight,* 809 F.2d 451 at 454 (7th Cir. 1987) (implicit obligation to update under amended Rule 11).

In *Elster v. Alexander,* 122 F.R.D. 593 (N.D. Ga. 1988) amended Rule 11 sanctions were imposed on plaintiff's attorney for all filings occurring after the effective date of the amendment. Rejecting counsel's argument that sanctions could not be imposed because the filing occurred prior to the amendment to Rule 11, the trial court cited this Court's Order promulgating the amendment, stating the amendment "shall take effect on August 1, 1983 and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." *Id.* at 600. The district court found that while the original pleading was filed 8 years prior to the effective date of amended Rule 11, all filings by plaintiff's attorney occurring in the 5 years after the amendment to Rule 11 were sanctionable under the amended Rule. Additionally, the court imposed sanctions for the conduct in the prior eight years under its inherent power to sanction and under Section 1927. *Id.* at 604, 605.

Likewise, in the instant case, the District Court imposed sanctions on Petitioner for filings which occurred prior to the amendment of Rule 11.

For the reasons stated above Respondent submits that Petitioner's failure to raise his issues in a timely manner before this Court should result in denying the Petition for Writ of Certiorari. While this Court has stated it will consider issues not passed on by a lower court only where "injustice might otherwise result," *Hormel v. Helvering, supra,* Petitioner has failed to adduce sufficient arguments to establish that an injustice is present in the case at bar. The District Court's Order did not result in an injustice, indeed, the District Court had a right to impose sanctions in the form of attorney's fees against Petitioner's original filing and subsequent actions based on its inherent authority, and statutory authority including 28 U.S.C. § 1927, as well as the pre-amended and amended versions of Rule 11. Respondent therefore asserts that the District Court's award of attorney's fees can be upheld on any of these grounds and the Petition for Writ of Certiorari should be denied.

The United States Court of Appeals for the Eleventh Circuit Has Not Rendered A Decision in Conflict With the Second and Seventh Circuit Courts of Appeals.

Contrary to Petitioner's assertions, the Eleventh Circuit's decision in the instant case is not at odds with prior decisions or with decisions rendered in the Second and Seventh Circuits. The Eleventh Circuit's decision is consistent with this Court's Order promulgating the amendment to Rule 11 and is clearly distinguishable from the cases cited by Petitioner. *Hashemi v. Campaigner Publications, Inc.,* 784 F.2d 1581 (11th Cir. 1986); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight,* 809 F.2d 451 (7th Cir. 1987); and *Oliveri v. Thompson,* 803 F.2d 1265 (2nd Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1373 (1987).

This Court's Order promulgating the 1983 amendment to Rule 11 states that the amendments

"shall take effect on August 1, 1983 and shall govern all civil proceedings thereafter commenced and, *insofar as just and practicable, in proceedings then pending.*" 97 F.R.D. 165 (1983) (emphasis added). The plain language of this Court's Order establishes that the amended version of Rule 11 can be applied to cases pending when the amendment took effect. Petitioner attempts to rely on the Eleventh Circuit's ruling in *Hashemi Campaigner Publications, Inc., supra,* where the court affirmed the district court's refusal to retroactively impose sanctions pursuant to amended Rule 11 in a case dismissed before the amendment became effective.

Of crucial importance in the case at bar is recognition that in *Hashemi,* the litigation was filed and concluded before the 1983 amendments to Rule 11 became effective. No portion of the case was still pending at the time the August 1, 1983 amendment took effect. On that basis, the Eleventh Circuit refused to apply amended Rule 11. In contrast, in the instant case, the overwhelming majority of this action was litigated for five years following the effective date and accordingly, it is abundantly clear that the instant case is distinguishable from *Hashemi* and, as such, the *Hashemi* holding is inapplicable.

Petitioner also attempts to rely on the decision in *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, supra,* arguing that amended Rule 11 did not apply and there was no obligation to update papers that were not subject to sanctions when filed. The factors distinguishing *Pantry Queen* from the instant case are significant. Without articulating any rationale for its actions, the district court, in *Pantry Queen,* imposed sanctions in the nature of attorney's fees against plaintiff's counsel. Because of the district court's failure to explicitly state any basis for sanctions, the Seventh Circuit analyzed the applicability of Rule 11, a litany of other statutory, and equitable grounds,

upon which the district court may have relied. After reviewing the facts, the Seventh Circuit concluded Rule 11 sanctions were not warranted and did not limit a district court's ability to apply the Rule to a case pending at the time the amended Rule 11 became effective. On that issue, the court concluded that the plaintiff's subsequent amendments to its original filing, "[C]orrects any factual mistake in the answer to the complaint and takes Rule 11 out of this case." *Id.* at 455.

Petitioner's further attempts to rely on *Pantry Queen* as holding that amended Rule 11 does not impose on parties a continuing obligation to update papers is inapposite to the opinion of the court. The Seventh Circuit actually held that "there is an implicit obligation to update because Rule 11 applies to all papers filed in the litigation. Each filing must reflect the results of reasonable inquiry." *Id.* at 454. The *Pantry Queen* court did not impose amended Rule 11 sanctions because subsequent filings corrected factual mistakes appearing in the original pre-amendment filing. *Id.* at 455. In the case at bar Petitioner's Complaint, filed prior to the Rule 11 amendment, was sanctionable under pre-amendment Rule 11 and other statutory authority, as well as the inherent authority of the District Court. Petitioner's continued prosecution of meritless claims in the trial court subsequent to the amendment to Rule 11 is inconsistent with the holding in *Pantry Queen. See also, Elster v. Alexander, supra.* Accordingly, the Seventh Circuit's holding in *Pantry Queen* does not support Petitioner's argument, and is not in conflict with the Eleventh Circuit.

The Second Circuit's decision in *Oliveri v. Thompson, supra,* is as readily distinguishable as *Hashemi* and *Pantry Queen.* In *Oliveri,* the case on appeal had nothing to do with retroactive application of amended Rule 11. Actually, the district court

found no violation of pre-amendment or post-amendment Rule 11 in the plaintiff's initial complaint, and only imposed limited Rule 11 sanctions for subsequent actions taken by plaintiff's attorney. Reviewing the facts of the case, the Second Circuit found these limited sanctions were inappropriate. *Oliveri* at 1276, 1279. Petitioner nevertheless attempts to portray *Oliveri* as applicable to the instant case and cites dicta out of context. Petitioner's distorted portrayal fails to recognize that all of his subsequent filings were governed by amended Rule 11. As the Seventh Circuit in ***Pantry Queen*** explicitly stated, "a court has ample support for sanctions when new filings do not reflect the full picture." ***Pantry Queen*** at 454.

As the District Court observed during discovery, Respondent repeatedly advised Petitioner that his claims were baseless. (Pet. App. 2). The District Court recognized that Petitioner knew or should have known of the frivolousness of his claims. On the basis of such finding, the court correctly applied amended Rule 11 and imposed sanctions against Petitioner. Petitioner's egregious conduct in pursuing the frivolous claims was also sanctionable under statutory authority and the inherent authority of the court. Accordingly, the Eleventh Circuit's affirmance of the District Court's imposition of amended Rule 11 sanctions is correct and is not at odds with the decisions of the Second and Seventh Circuits. The District Court had numerous grounds upon which to base sanctions against Petitioner and the imposition of sanctions based on amended Rule 11 was proper. More importantly, in his initial appeal to the Eleventh Circuit, Petitioner failed to challenge the District Court's authority to apply the amended rule in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied and additional sanctions imposed on Petitioner.

Respectfully submitted,

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